DOCUMENT RESUME

ED 193 635 CS 205 880

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TITLE Selected Perspectives on Legal Problems of the Alternative Press.
PUB DATE Jul 80
NOTE 20p.: Paper presented at the Center for Contemporary Culture, Temple University (Philadelphia, PA, July 1980).

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Court Litigation: *Equal Protection; Financial Problems: *Freedom of Speech: *Legal Problems: News Media: *Newspapers: *Press Opinion
IDENTIFIERS *Alternative Press

ABSTRACT

The legal problems faced by publishers of alternative newspapers are often compounded by the limited availability of the funds they have either for legal defense or for initiating lawsuits. Although both the courts and journalism's professional associations theoretically support the position that the alternative press possesses rights identical to those of the established press, the effective exercise of those rights can be expensive, and alternative newspapers have meager resources. Legal problems encountered most often by all newspapers are damage suits for defamation, citations for contempt of court, denial of access to public information or proceedings, suits for illicit invasions of privacy, and complaints concerning copyright. The legal problems peculiar to the alternative press involve extra-legal harrassment by government and its selective enforcement of applicable law. Additional problems include the reluctance of the establishment press to come to the assistance of an underground paper and the prohibitive cost of premiums for policies insuring publishers from financial losses resulting from legal setbacks. (AEA)

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SELECTED PERSPECTIVES ON LEGAL PROBLEMS OF THE ALTERNATIVE PRESS

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Temple University

July, 1980

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... right conclusions are more likely to be gathered / out of a multitude of tongues / than through any kind of authoritative selection / To many this is / and always will be, folly / but we have staked upon it our all.

Judge Learned Hand

The preceding observation by Judge Learned Hand, in the historic case of Associated Press versus United States, explains why American courts, generally, have tended to consider the alternative press entitled to the same rights as "professional" newspapers.[1]

That has not been easy, always, because some of the alternative press's "underground" newspapers have behaved in an outrageous manner, by conventional standards of journalistic propriety, from time to time.

The establishment's disapproval of irreverant and "irresponsible" media like "underground" newspapers reflects an old complaint.

In 1591, an English critic observed that "scarce a cat can look out of a gutter", but starts a half-penny Chronicler. The following year, another critic complained that:

> A company of idle youthes, loathing honest labour and dispising lawful trades, betake themselves to a vagabond and vicious life, in every corner of Cities and market Townes of the Realme, singing and selling ballads and pamphlets full of ribaudrie, and all scurrilous vanity, to the prophanation of God's name, and withdrawing people from Christian exercises, especially at faires, markets, and such public meetings.[2]

Such feeling translates itself, today, into the outrage that many Americans feel toward our "underground" press. Given the errancies of some amateur journalists --- the errors of some "professional" journalists are annoying enough --- such outrage is understandable.

We need to remind oursleves, however, that sometimes the very things that make a newspaper <u>grate</u> are the things that make a newspaper <u>great</u>.[3]

Because they are frequently abrasive and antagonistic --- by definition, more or less --- today's alternative newspapers enjoy a somewhat "constipated" form of protection for their rights of free press.[4]

On the theoretical level, of course, both our courts and journalism's professional associations take the position that alternative newspapers possess rights identical to those of the New York Times, the Wall Street Journal or the Christian Science Monitor.

The effective exercise of those rights can be expensive, nevertheless, and alternative newspapers have meager resources. Obtaining assistance in asserting such rights involves systems of priorities---economic, professional and judicial --- into which the alternative newspaper editor or publisher has minimal input, perhaps.

Relative insensitivity toward the rights of "underground" newspapers, by newspaper editors and publishers of the "establishment" press, was acknowledged by a Tennessee editor in a talk at a 1972 convention of journalism educators.

"Many editors, who have come to identify with the authorities, now find themselves unable to identify with those now in conflict with the authorities," John Seigenthaler of the Nashville Tennesean said.

"And there are those who are utilizing the First Amendment, "Seigenthaler explained, "who need its protection and the support of those of us who have lived by it and benefitted from it."

"But too many of us are reluctant to give that support," Seigenthaler said.

"We are reluctant to give it to the underground press," he added.

"In the face of government grown too bing," Seigenthaler remarked, "we are forced to recognize that our passion for the truth, as Paul Tillich says, is silenced by answers which have the weight of undisputed authority."

"But the First Admendment was written so that we might contest authority, Seigenthaler pointed out, "so that we might exercise authority on our own and of our own."

"We never envisioned a press establishment we did not control," Seigenthaler observed. "Now there is one upon us and it includes diverse, disagreeable and ever disrespectful elements."

"Because we know not how to protect ourselves from them and are wont to join with them in work we should be about," he explained, "We are confronted by this crisis in credibility."

"As Deway said," Seigenthaler reminded his audience, "we only think when confronted by crisis."

"The crisis is here," Seigenthaler concluded, "but we have not begun to think."[5]

Because professional organizations in journalism have been relatively insensitive, at times, to the special problems of the alternative press --- even though committed, on the theoretical level, to its equal rights --- the legal problems of the alternative press have tended to involve the selective enforcement of applicable law and extra-legal harrassment of "underground" newspapers.

Actually, much of the protection that is enjoyed by America's "establishment" press was developed through court actions involving publishing efforts that would be terms alternative newspapers.

The historic case of Gitlow versus New York, in which the United States Supreme Court ruled that the Fourteenth Amendment to the federal constitution extended the First Amendment bar against abridgement of press freedom to state legislatures --- the First amendment applied, originally, to Congress alone --- involved an alternative press type enterprise; the historic case of Near versus Minnesota, in which the U.S. Supreme Court articulated best, perhaps, its disapproval of prior restraint on publication, involved what today would be called an "underground" newspaper.

For those reasons, anyone exploring the legal framework in which the

alternative press operates can do so, quite adequately, by reviewing the standard works on press law. Among the best available to laypeople are Donald Pember's Mass Media Law, William Francois's Mass Media Law and Regulation, Dwight Teeter and Harold Nelson's Law and Mass Communication, Donald Gillmor and Jerome Barron's Mass Communications Law and Marc Franklin's First Amendment and the Fourth Estate.

Legal problems encountered most often, by all newspapers --- alternative or "establishment" --- are damage suits for defamation, citations for contempt of court, denial of access to public information and/or proceedings, suits for illicit invasions of privacy, and complaints concerning copyright.

Certain aspects of those areas of the law, given the character of some "underground" newspapers, create special hazards for the alternative press.

Under existing libel law, a public official or "public figure" cannot collect damages for defamatory and false statements related to his or her official conduct or "public" behavior unless he or she can submit "convincing evidence that such statements were made with "actual malice" --- knowledge that they were false, or "reckless disregard" for whether or not they were false.

Since "establishment" media have more resources --- time, money, etc. --- helpful in following news leads and checking things --- they are less likely to be found to have exercised "reckless disregard" for the truth, regardless of motives or subjective respect for that truth.

Moreover, the scope of the preceding priviledge --- it is known as the Sullivan-News York Times case desision privilege, or "Time Rule", in libel --- has been reduced in recent years by the Elmer/Gertz versus Robert/Welch case and several that have followed the decision in that case.

In the Gertz decision, the court narrowed the definition of a "public figure" sharply, and said that the federal constitution's First amendment

did not bar an award of damages, in libel litigation, if the defendant had exercised "negligence" in publishing defamatory and false statements about a plaintiff not considered a "public figure".

Given the difficult circumstances under which many alternative newspapers are edited, by amateur journalists sometimes, it is readily apparent that "underground" newspapers are more likely to be found to have exercised either "negligence" or "reckless disregard" than their more affluent "establishment" or "professional" counterparts.[6]

One of the tests for "negligence" being used today, in libel litigation, involves adherence to conventional standards of "professional" practice, which many alternative newspapers reject out of hand.

The manner is which the Gertz decision can be seen to have injured the alternative press, especially, was anticipated by Gertz himself. In a personal analysis of the decision --- Gertz is a First amendment scholar, civil rights attorney and noted libertarian himself --- Gertz told journalists attending a libel seminar conducted about a year after the decision that it probably would impact upon "underground" newspapers most heavily.[7]

In addition to the results of the Gertz decision and its progeny, other aspects of libel litigation present special problems for the alternative press.

One of the best established defenses for defamatory and false statements of fact is a principle known for many years as the "reportorial" privilege. Under that principle, any news report of a "public proceeding" is protected provided the report is a "fair and accurate" account of the procedings.

The privilege of "fair and accurate" reporting can be forfeited, however, by writers injecting their opinion or editorial bias into the report. Traditionally, the alternative press has intermingled news and editorial commentary, while "establishment" papers have made the separation of news and editorial opinion a tenet of their ethics codes.

In privacy law, also, alternative newspapers can encounter special hazards. The conventional defense against suits for invasion of priacy, by news media, is "newsworthiness" of the private facts published. Since their conception of news so often disagrees with that of the "establishment" or mainstream papers --- by definition, more or less --- alternative papers can experience difficulty convincing a court that it should find "newsworthy" something not considered news by a community's majority.

Policies insuring publishers from financial lossess resulting from privacy, libel and other legal setbacks are available to alternative papers, as they are to others. However, the premiums are determined by a newspaper's record in litigation, obviously.

As mentioned previously, the legal problems more or less peculiar to the alternative press involve extra-legal harrassment by government and its selective enforcement of applicable law.

Because they are so often offended by alternative newspapers --- the purpose of such papers can be seen as "to comfort the afflicted and afflict the comfortable" --- the "establishment" press has been slow, at times, to come to the assistance of an "underground" paper.

The Los Angeles Times once neglected press freedom issue involving the Los Angeles Free Press, for example, for many weeks before coming to that paper's aid.

In a case related to the encouragement of alternative press enterprise, however, Wisconsin's court of appeals last year ruled that a printer who does nothing more than print a newspaper cannot be held liable for its content, even though such content turns out to be libelous.

The case involved a Madison publication, Take Over, and its contract printer, Port Publication of Port Washington. The printing firm and the owners and editors of Take Over were named as defendants in a $75,000 lawsuit brought

by Julie Maynard of Madison, a former police informant.

Ms. Maynard alleged that a February 9, 1976, issue of Take Over, which Port Publications printed, contained false, malicious and defamatory statements about her. The article was accompanied by a picture which she alleged was obscene, malicious and defamatory.

After a County judge dismissed Port Publications as a defendant, Ms. Maynard appealed that ruling.

An issue in the appeal was whether independent contract printers, without knowledge that statements presented to them for publication are false and defamatory, have a constitutional privilege to print them. Port Publications claimed First Amendment protection against the lawsuit.

The Third District Appeals Court held that to require contract printers to verify statements in publications presented to them "would stifle the free flow of information, which the First Amendment was designed to protect. Such a duty to verify might lead these printers to engage in indiscriminate censorship".

The case was considered important by Wisconsin journalists and the Milwaukee chapter of The Society of Professional Journalists filed legal briefs expressing concern about implications of the suit.

In another legal development that could prove of immense help to the alternative press, the United States Supreme court ruled last spring that cities enjoy no immunity in civil rights suits. That decision, presumably, gives the editor or publisher of an alternative newspaper permission to sue for damages if his or her civil rights are violated by "state action" on the local level.

Few alternative newspapers have the resources to mount a suit of any kind, however.

Perhaps some foundation should fund the establishment of a legal defense center devoted to protecting the freedom of the alternative press.

It's essential to a viable democracy.

NOTES

1. See, for example, "Court Rules Equal Treatment for Underground and Established Press" FOI Digest Volume 13 Number 16 (November/December 1971), a news item reporting a federal court decision in which it was ruled that police departments could not refuse access to records requested by underground news reporters if such departments furnished the same records to other representatives of the press. The Equal Protection and Due Process clauses of the Fourteenth amendment prohibited such discrimination, the court said.
(Quad City Community News Services, Inc. v Jebens)

2. Theodore Peterson, Jay Jensen abd William Rivers
The Mass Media and Society (Urbana: Illinois University of Illinois Press, _____) p226

3. See Fairchild Publications advertisement, Editor & Publisher
January 27, 1968 p25

4. See, for example, "Legal Struggles of Underground Press will Test Press Freedom," FOI Digest September/October 1970 p4 and Barbara Isenberg "Press Law Meets Underground Papers," Wall Street Journal Aug. 13, 1970

5. Unpublished manuscript "Talk by John Seigenthaler" to Kappa Tau Alpha awards luncheon, at August, 1972 convention of Association for Education in Journalism, at Southern Illinois University, Carbondale, Ill. p5

6. See, for example "All News Articles are Libel Evidence" The News & The Law, November/December 1979 pp40-41. (The Report of a Kansas court t's ruling that an alternative newspaper's past record for accuracy and care could be introduced as evidence supporting allegation absence of appropriate care).

7. Seminar on libel law arranged and moderated by Author for Northern Illinois Prof sional chapter, Society of Professional Journalists, Sigma Delta Chi, in summer of 1975 at Wheaton, Ill.

8. "Cities Lose Immunity to Rights Suits" Philadelphia Inquirer April 17, 1980 p1

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